
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY KALEIALII, REBECCA LEHIA MILES
and ANNIE K. BOYD and ROBERT N. BOYD
and VICTOR K. BOYD, by their Guardian ad
Litem, JOSEPHINE BOYD,

Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY and
HENRY HOLMES, Trustees under the Will of
John J. Sullivan, HENRIETTA SULLIVAN,
JOHN BUCKLEY, PRISCILLA ALBERTA
SULLIVAN CLARKE and ROBERT KIRK-
WOOD CLARKE, a Minor, JUANITA ELLEN
CLARKE, a Minor, and THOMAS WALTERS
CLARKE, a Minor,

Defendants in Error.

REPLY BRIEF FOR PLAINTIFFS IN ERROR

In Error to the Supreme Court of the Territory of
Hawaii.

ANDREWS & PITTMAN and FRANK ANDRADE,
Attorneys for Plaintiffs in Error.

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F. D. Monckton,

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As the construction of the deed has been thoroughly discussed, we will refrain from unnecessarily burdening the court by repetition and confine our reply to the points raised in the supplemental brief of S. H. Derby, of counsel for Defendants in Error, illegitimacy and laches.

On the question of laches, we desire to call the court's attention to the fact that this is a statutory

action and that the same was instituted within less than three months after plaintiffs' right of action accrued, hence, neither the statute of limitations nor laches could possibly be pleaded.

The mere fact that Mary and Robert became of age more than thirty years ago and before the last deed from Peke to Maria and must have known of the transaction, could not possibly affect the right of the plaintiffs to bring this action. What Robert and Mary might or should have known could not affect plaintiffs' right of action, as it is elementary that remainder-men cannot assert their rights until after the termination of the particular estate upon which the remainder is created. The improvements made on the property by the defendants prior to the death of Peke would not bar plaintiffs' right of action, as any protest on behalf of plaintiffs or assertion of their rights prior to the death of Peke, when plaintiffs' right of action accrued, would have been futile. No testimony could have been introduced at the trial of this cause showing that plaintiffs had asserted their rights prior to the death of Peke and protested against any improvements made by the defendants on the property involved, as such testimony would have been immaterial and irrelevant.

Plaintiffs are criticized for failing to disclose their claims to the defendants who in good faith had dwelt on the property for thirty years and put up substan-

tial improvements. Plaintiffs had no right to assert their claims or make any protests, as they had only a contingent interest in the property which would accrue upon the death of Peke. The defendants, who were in possession of the property, had full knowledge of the contents of the Adams deed and should have governed themselves accordingly. They must have known at the time they made the improvements that they only held the life estate of Peke and that, upon the death of Peke, the property would go to the plaintiffs. If they did not know it, it was not the fault of the plaintiffs, as defendants could have obtained legal advice.

Mr. Derby has devoted the main portion of his supplemental brief to a discussion of the law governing the right of illegitimate children to inherit from their father, entirely overlooking the fact that there is no evidence showing, or even tending to show, that Mary Kaleialii and Robert Boyd were illegitimate children and not the legitimate children of Peke and Mr. Stone, their mother's husband. It is true that Mary Kaleialii testified that she did not know who her father was and that, at the time of the birth of Robert, Mr. Stone was away. (T. R. 86.) She did not, however, testify as to where Mr. Stone, her father, had gone. There is absolutely no evidence in the record showing the non-access of the husband, Mr. Stone.

The mere fact that a child did not know who his father was, would not establish illegitimacy. Illegitimacy must be proven by strong, convincing and almost impeccable evidence. A child is presumed to be legitimate until that presumption is overcome beyond a reasonable doubt.

Jones in discussing the presumption of legitimacy, said:

“There is no presumption of the law more firmly established and founded on sounder morality and more convincing reason than the presumption that children born in wedlock are legitimate. In his work on Evidence, Stephen thus states the modern English rule as to the presumption in favor of legitimacy: ‘The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within such a time after the dissolution thereof and before the celebration of another valid marriage, that his mother’s husband could have been his father, is conclusive proof that he is the legitimate child of his mother’s husband, unless it can be shown, either that his mother and her husband had no access to each other at any time when he could have been begotten, regard being had both to the date of the birth and to the physical condition of the husband or that the circumstances of their access (if any) were such as to render it highly improbable that sexual intercourse took place between them when it occurred.’”

Jones Commentaries on Evidence, Vol. 1, pp. 448-449.

“A child born during wedlock is presumed to be legitimate, though the husband and wife have been mar-

ried but fifteen days and she had been divorced from her former husband but twenty days, such divorce being based upon service of process by publication, and there being no evidence showing whether or not such husband was a resident of the state or lived with his wife at or within the period of conception. Whenever the child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until the presumption is encountered by such evidence as proves to the satisfaction of those who are to decide the question that such intercourse did not take place at any time when by such intercourse the husband could be the father of the child. To bastardize a child born in lawful wedlock, the most *clear and conclusive evidence* of nonaccess is required."

Jones Commentaries on Evidence, Vol. 1, pp. 450-451.

"In England, unless the husband was shown to be beyond seas during all the period in which it was possible for the wife to become pregnant and be delivered of a child, or unless it could be shown beyond question that the husband had no power of procreation, this presumption was so absolute that the doctrine of *filiatio non potest probari* applied, and no proofs would be received to dispute the legitimacy of the child. This doctrine has practically been adopted in the United States with the modification that if the child is born under such circumstances that render it impossible that the husband of its mother can be its father, then the child may be adjudged a bastard. So that before such child can be adjudged a bastard, the proof must be clear, certain and conclusive, either that the husband had no powers of procreation, or the circumstances were such

as to render it impossible that he could be the father of the child."

Jones Commentaries on Evidence, Vol. 1, pp. 452-453.

"The presumption arises, *though the parties live apart* by mutual consent, though not when they are separated by the *divorce* of the court. They are then presumed to obey the judgment of the court."

Jones Commentaries on Evidence, Vol. 1, p. 455.

We also most respectfully call the court's attention to the fact that Mary Kaleialii is a Hawaiian, unfamiliar with the English language and a stranger to court proceedings. The fact that in one breath she said Boyd was her father and, in the next, said she did not know who her father was, clearly shows that she was confused and did not know what she was testifying to, her confusion evidently being due to her lack of knowledge of the English language and court proceedings.

If the statements of Mary Kaleialii are sufficient to bastardize her and her brother, then the well-established rule of law that a child is presumed to be legitimate until proven illegitimate by strong and irrefutable evidence will have to be ignored and the burden shifted to the shoulders of the child who has been attacked on the grounds of illegitimacy.

The court should not overlook the fact that Alexander Adams, Jr., deeded the property to Peke and

Maria, his daughters, and that the interests of the plaintiffs was acquired not by inheritance, but through purchase.

Section 3248 of the Revised Laws of Hawaii, 1915, reads as follows:

“Every illegitimate child shall be considered as an heir to his mother and shall inherit her estate in whole or in part, as the case may be, in like manner as if he had been born in lawful wedlock.”

Revised Laws of Hawaii, 1915, Sec. 3248.

There is absolutely no merit to the points raised in Defendants in Error's supplemental brief—laches and illegitimacy. The only question before the court, in our humble opinion, is the construction of the deed. Was the deed absolute, or did it simply create a life estate in Peke and Maria with remainder over to their children?

In view of the evidence adduced at the trial and the wording of the deed, we must respectfully submit that the Plaintiffs in Error should prevail.

Respectfully submitted,

ANDREWS & PITTMAN,

FRANK ANDRADE,

Attorneys for Plaintiffs in Error.

Dated, Honolulu, T. H.,

December 13, A. D. 1916.

